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No. 87-2127

In the Supreme Court of the United States

AMERICAN FOREIGN SERVICE ASSOCIATION, ET AL.,
APPELLANTS

v.

STEVEN GARFINKEL, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF AND MOTION OF THE SPEAKER AND LEADERSHIP GROUP FOR LEAVE TO FILE BRIEF AMICI CURIAE OUT OF TIME

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For the following reasons, the Speaker and Leadership Group respectfully move for leave to file the attached brief *amici curiae.*

In this appeal, the Executive Branch has challenged an act of Congress. This Court has "long held that Congress is the proper party to defend the validity of a statute," *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 940 (1983), when the Executive Branch challenges the statute's constitutionality. In such cases, the Speaker and Leadership Group ("House parties") is the normal mechanism by which the House of Representatives presents its institutional interest. *See, e.g., Morrison v. Olson,* 108 S. Ct. 2597 (1988).

Pursuant to Rule 36.2 of this Court, an *amici curiae* brief presenting the position set forth herein was due to be filed on December 29, 1988. However, that date was in the final days of the One Hundredth Congress. The House parties, like the Senate, appropriately awaited the start

and organization of the One Hundred First Congress prior to filing. The merits of the challenge to this statute, if reached, would raise major questions of the separation of powers in matters of national security, concerning which deliberations were appropriate after the organization of the Congress.

Counsel for the parties have been advised of, and provided in advance with draft copies of, the accompanying brief in advance of the printing of this motion and brief, allowing appellees thereby to review those arguments in their preparations for filing their own brief, which is not yet due. Neither the appellants nor the appellees object to the filing of the brief *amici curiae*. Accordingly, the House parties move for leave to file the attached brief *amici curiae*.

Respectfully submitted,

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Alejandrino v. Quezon, 271 U.S. 528 (1926)	11
American Foreign Service Association v. Garfinkel, 688 F. Supp. 671 (D.D.C. 1988)	10

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Cases—Continued

Ameron, Inc. v. U.S. Army Corps of Engineers, 610 F. Supp. 750 (D.N.J. 1985), *aff'd*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988) 19
Ashwander v. Tennessee Valley Authority, 297 U.S. 288, *reh'g denied*, 297 U.S. 728 (1936) 4, 12
Barenblatt v. United States, 360 U.S. 109, *reh'g denied*, 361 U.S. 854 (1959) 22
Bowsher v. Synar, 478 U.S. 714 (1986) 1, 17
Buckley v. Valeo, 424 U.S. 1 (1976) 17
CIA v. Sims, 471 U.S. 159 (1985) 21
Cole v. Young, 351 U.S. 536 (1956) 17
Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 17
County of Los Angeles v. Davis, 440 U.S. 625 (1979) 12
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Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 22
Environmental Protection Agency v. Mink, 410 U.S. 73 (1973) 20
Gelston v. Hoyt, 6 U.S. (3 Wheat.) 246 (1818) 28
Gilligan v. Morgan, 413 U.S. 1 (1973) 14
Golden v. Zwickler, 394 U.S. 103 (1969) 12
Goldwater v. Carter, 444 U.S. 996 (1979) 13
Gravel v. United States, 408 U.S. 605 (1972) 26
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 25
Helstoski v. Meanor, 442 U.S. 500 (1979) 1
Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) 13
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 17
Japan Whaling Association v. American Cetacean Society, 478 U.S. 221 (1986) 1, 5, 18
Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838) 19
Kent v. Dulles, 357 U.S. 116 (1958) 21
Kleppe v. New Mexico, 426 U.S. 529 (1976) 14
Kremens v. Bartley, 431 U.S. 119 (1977) 4, 12, 13
Laird v. Tatum, 408 U.S. 1 (1972) 15
Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) 28

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Cases—Continued

McGrain v. Daugherty, 273 U.S. 135 (1927) 5, 22
Morrison v. Olson, 108 S. Ct. 2597 (1988) 17
National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974) 19
New York Times Co. v. United States, 403 U.S. 713 (1971) 21
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Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) . 4, 13
Rescue Army v. Municipal Court, 331 U.S. 549 (1947) . 15
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United States Army Corps of Engineers v. Ameron, Inc., 109 S. Ct. 297 (1988) 1
United States v. Helstoski, 442 U.S. 447 (1979) 1
United States v. Nixon, 418 U.S. 638 (1974) 20
United States v. Robel, 389 U.S. 258 (1967) 21
Watson v. Buck, 313 U.S. 387 (1941) 12
Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787 (1987) 17
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) ..... *passim*

Legislative Materials and Statutes:

U.S. Const., art. I, § 8, cl. 1 18
U.S. Const., art. I, § 8, cl. 3 18
U.S. Const., art. I, § 8, cl. 12 18
U.S. Const., art. I, § 8, cl. 13 18
U.S. Const., art. I, § 8, cl. 14 18
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U.S. Const., art. I, § 8, cl. 18 18
U.S. Const., art. I, § 9, cl. 7 26
U.S. Const., art. II, § 2, cl. 1 19
U.S. Const., art. II, § 2, cl. 3 19
129 Cong. Rec. 14283 (1983) 7
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48 Cong. Rec. 5223 (1912) 23
48 Cong. Rec. 5639 (1912) 24
48 Cong. Rec. 7513 (1912) 23
53 Fed. Reg. 38,278–80 (1988) 11
The Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1114 25

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Legislative Materials and Statutes—Continued

Conference Report to Accompany the Civil Service Reform Act of 1978, H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. (1978) 25

Conf. Report to Accompany H.J. Res. 396, H.R. Conf. Rep. No. 1398, 100th Cong., 1st Sess. 1179 (1987) 9

Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 100th Cong., 1st Sess. (1987) 8, 25

Congress and the Administration's Secrecy Pledges: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 100th Cong., 2d Sess. (1988) 8

Hearings Before the Subcomm. on Economy in Government of the Joint Economic Committee, 90th Cong., 2d Sess. (1968) 25

Hearings on H.R. 11280 Before the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. (1978) 25

Hearings on Military Functions, National Military Establishment Appropriations Bill for 1949, House Comm. on Appropriations, 80th Cong., 2d Sess. (1948) (Part 3) 27

House Comm. on the Armed Services, *Federal Polygraph Limitations and Anti-Censorship Act of 1984,* H.R. 4681, H.R. Rep. No. 961, 98th Cong., 2d Sess., Part 2 (1984) 7

House Comm. on Government Operations, *The Administration's Initiatives to Expand Polygraph Use and Impose Lifelong Censorship on Thousands of Government Employees,* H.R. Rep. No. 578, 98th Cong., 1st Sess. (1983) 7

House Comm. on Government Operations, *Legislation Needed to Curb Secrecy Contracts,* H.R. Doc. No. 991, 100th Cong., 2d Sess. (1988) ..... *passim*

House Comm. on Post Office and Civil Service, *Federal Polygraph Limitation and Anti-Censorship Act of 1984,* H.R. 4681, H.R. Rep. 961, 98th Cong., 2d Sess. (1984) ..... *passim*

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Legislative Materials and Statutes—Continued

Final Report of the Senate Sel. Comm. to Study Governmental Operations With Respect to Intelligence Activities, S. Rep. No. 755, 94th Cong., 2d Sess 28, 29

Postal Service and General Government Appropriations Act, 1988, Pub. L. 100-202, 101 Stat. 1329 (1987) ..... *passim*

Report of the Congressional Committee Investigating the Iran-Contra Affair, S. Rep. No. 216 & H. Rep. No. 433, 100th Cong., 1st Sess. (1987) 23, 30

The Federalist, No. 58 26

The Federalist, No. 69 19

5 U.S.C. § 552a 21

5 U.S.C. § 552(b)(1) 21

5 U.S.C. § 2302(b)(8) 25

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18 U.S.C. § 1016 21

18 U.S.C. § 792 21

18 U.S.C. § 385 28

50 U.S.C. § 1801-1811 21

Pub. L. No. 93-559, 88 Stat. 1804 (1974) 29

Pub. L. No. 94-329, 90 Stat. 757 (1976) 29

Pub. L. No. 95-454, 92 Stat. 1114 (1978) 25

Pub. L. No. 98-164, 97 Stat. 1017 (1983) 7

Pub. L. No. 98-477, 98 Stat. 2209 21

Pub. L. No. 99-83, 99 Stat. 264 (1985) 29

Pub. L. No. 100-440, 102 Stat. 1721 (1987) 12

Pub. L. No. 100-456, 102 Stat. 1918 (1988) 25

National Security Decision Directive 84:

Hearings Before the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. (1983) .... *passim*

Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary and the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service, 98th Cong., 1st and 2nd Sess. (1983 and 1984) ... 6

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Review of the President's National Security Decision Directive 84 and the Proposed Department of Defense Directive on Polygraph Use: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 98th Cong., 1st Sess. (1983)..... 6
Miscellaneous:
R. Berger, *Executive Privilege: A Constitutional Myth* (1974)..... 22
E. Corwin, *The Constitution and What It Means Today* (1973 ed.)..... 27
M. Farrand, 1 *The Records of the Federal Convention of 1787* (1937)..... 27
L. Fisher, *Presidential Spending Power* (1975)..... 29
T.M. Franck & E. Weisband, *Foreign Policy by Congress* (1979)..... 29, 30
Galloway, *The Investigative Function of Congress*, 21 Am. Pol. Sci. Rev. (1927)..... 22
E. Huzar, *The Purse and the Sword: Control of the Army by Congress through Military Appropriations 1933–1950* (1950)..... 27
E. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, Ann. of the Am. Acad., Sept. 1953..... 27, 28
A. Schlesinger, *Congress Investigates: 1792–1974* (1975)..... 22, 23
S. Spero, *Government As Employer* (1948)..... 23
T. Taylor, *Grand Inquest: The Story of Congressional Investigations* (1955)..... 22
S. Turner, *Secrecy and Democracy* (1985)..... 11
Wolfson, *Is a Presidential Item Veto Constitutional?* 96 Yale L.J. 838 (1987)..... 27

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INTEREST OF THE AMICI CURIAE

The Speaker and Leadership Group of the House of Representatives ("House Amici")[1] respectfully submit this brief as *amici curiae* in support of the position that the case should be dismissed, or the decision of the district court vacated and remanded for reconsideration, on the ground that it no longer presents a concrete controversy; if the merits are reached, that district court deci-

[1] The Speaker and Leadership Group are the Honorable Jim Wright, Speaker of the House of Representatives; the Honorable Thomas S. Foley, Majority Leader; and the Honorable Tony Coelho, Majority Whip.

Participation by the Speaker and Leadership Group is the standard mechanism by which the House of Representatives pursues its institutional interests in litigation. *See, e.g., United States Army Corps of Engineers v. Ameron, Inc.*, 109 S. Ct. 297 (1988); *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986); *Bowsher v. Synar*, 478 U.S. 714 (1986). The Speaker of the House has also represented the institutional interests of the body in various litigation in this Court. *See, e.g., United States v. Helstoski*, 442 U.S. 447 (1979); *Helstoski v. Meanor*, 442 U.S. 500 (1979).

sion should be reversed and the Congress' authority to enact the challenged Act of Congress should be sustained. After the Congress adopted section 630 of the Treasury, Postal Service and General Government Appropriations Act, 1988, Pub. L. 100-202, 101 Stat. 1329 (1987), a moratorium on agency use of certain nondisclosure forms, a single District Judge struck down that statute. The district court held that the Congress' role is so inconsequential, and the President's authority so preeminent, in the area of national security information, that the President can act in contravention of a duly enacted statutory provision. Yet, the same district court then proceeded to conclude that the President's use of those nondisclosure forms violated the Constitution.

The district court grievously erred in ignoring the statute's constitutional basis: this Court's many precedents recognizing Congressional authority, and rejecting the notion of exclusive Presidential authority, in the national security area. However, that ultimate question of the allocation of powers between the branches is not properly before the Court in this case. While the district court broke loose from the constraints of normal jurisprudential considerations to espouse its theory of constitutional law, this Court may well recognize that the current dispute does not presently give rise to a case or controversy. Rather, the controversy over the Information Security Oversight Office's (ISOO) 1983-89 "anti-leak" or "nondisclosure" program challenged by the plaintiffs has been the subject of significant give and take between the executive and legislative branches. This dispute regarding the precise language to be used in restricting the speech of employees who have access to sensitive information lacks sufficient focus, particularly with ISOO's retreat from the most objectionable aspects of that program concerning "classifiable" information. The courts should permit the ongoing dialogue between the political branches to proceed until a satisfactory conclusion is reached. Not yet is

this Court required to demarcate the essential powers and limits of the political branches.

Although the Court should dispose of the case on these jurisdictional grounds, if, the posture of the case notwithstanding, the Court should decide to reach the basic question of constitutionality, the Court should reject the President's claim to unilateral uncontrollable power. This Court has consistently recognized that in the area of national security the President and the Congress share both responsibility and authority. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The Court should not deny to Congress its rightful place in the determination of national security policy. The President's opposition to the moratorium should not have been expressed by defiance of the law, but rather should have been expressed within the legislative process. The Constitution, and the political process, provide the President with many weapons, including the right to veto legislation which contain provisions he disfavors. The President's role in national security matters, though great, neither precludes the legislative branch from exercising its legislative authority nor excuses the executive from obeying the law. This notion of shared power lies at the heart of our constitutional system and has been upheld by this Court whenever challenged.

Consistent with recently developed and judicially accepted practice, both Houses of Congress appear as *amici* by their appropriate legal representatives to offer their institutional positions regarding this case. Although this case need not require the Court to reach the question of the Act's constitutionality, if the Court should address the issue its answer should be clear and unequivocal. If the district court's substantive decision is considered it should be rejected.

SUMMARY OF ARGUMENT

This Court should hold that the current dispute does not, at present, give rise to a case or controversy, because the significant give and take between the executive and

legislative branches has resolved, or will resolve, so large a part of the issues as not to leave a concrete basis for ruling. After Judge Gasch himself ruled that restrictions about "classifiable" information in nondisclosure forms were unconstitutional, ISOO finished discarding the forms not funded by section 630 and substituted new ones without the most objectionable feature. The controversy underlying Judge Gasch's ruling on the statutory moratorium became obsolete once the discarding of the forms secured that moratorium's primary purpose. The remaining issues about the moratorium are at present unfocused and do not currently warrant resolution of major constitutional issues.

To proceed with the case now would violate the cardinal axiom of judicial restraint in challenges to Acts of Congress. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347, *reh'g denied*, 297 U.S. 728 (1936) (Brandeis, J., concurring). The precedents support either dismissing the case, or vacating and remanding. *See, e.g., Kremens* v. *Bartley*, 431 U.S. 119, 134-35 (1977) (remanding for reconsideration rather than resolving "unfocused" constitutional claim); *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 587-9 (1972). Dismissal finds particularly strong support in the inappropriateness of needlessly judicializing the separation of powers in the national security context. "[T]here will be time enough [later] to consider that problem in a factual context," *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 445 (1977).

If, nonetheless, the Court reaches the constitutional challenge urged by the Executive Branch, it should recognize the constitutional and historically-confirmed authority of Congress in this context. The Court could only strike down an Act of Congress by "disabling the Congress from acting upon the subject" and "sustain[ing] exclusive presidential control" over the field. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-638 (1952) (Jackson, J., concurring). This Court recognizes a "premier role which both Congress and the Executive play in

this field." *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U.S. 221, 230 (1986).

Far from being disabled from acting on this subject, Congress has several independent sources for its authority. Statutory "regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its [executive] autonomy." *Nixon v. Administrator of General Services*, 433 U.S. at 445. Congress has historically protected the right of executive employees to bring it information on waste and wrongdoing, as part of Congress' broad oversight power. *McGrain v. Daugherty*, 273 U.S. 135 (1927).[2] Congress' power of the purse vests in it alone the decision on funding an "anti-leak" program, as confirmed by the Framers' views and the nation's history. A ruling against Congress' power would be a staggering blow to the system of checks and balances. This Court should decline to judicialize this subject, or to create an exclusive enclave of executive power, "for what is at stake is the equilibrium established by our constitutional system," *Youngstown*, 343 U.S. at 638.

ARGUMENT

I. THE COURT SHOULD HOLD THAT THE CASE NO LONGER PRESENTS A BASIS TO RULE, OR ELSE VACATE THE DISTRICT COURT'S RULING AND REMAND FOR RECONSIDERATION

The reasons why the present dispute does not currently give rise to a case or controversy begin with six years of significant give and take between the executive and legislative branches.

A. *Legislative Background*

In 1983, "after a number of embarrassing newspaper stories about plans of the Reagan administration," President Reagan announced he deemed himself " 'up to his

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[2] The 1912 Lloyd-LaFollette Act confirmed permanently that the "right of employees . . . to furnish any information to either House of Congress, or to . . . a Member thereof may not be interfered with or denied." 5 U.S.C. §7211. Recent history has reconfirmed Congress' authority to assure direct access to it of those with vital information.

keister' " in leaks and promulgated National Security Decision Directive 84 (NSDD-84), J.A. at 14, on March 11, 1983.[3] NSDD-84 massively expanded the use of nondisclosure agreements, previously limited to the intelligence agencies, to the large bureaucracies which handle routine military procurement and similar matters.[4] J.A. at 14.

Contrary to the Solicitor General's suggestion that the 1983 directive "did not generate significant public opposition" (Motion to Affirm at 19), within a year, hearings and reports on the directive by four different Congressional committees documented the large scale of the program [5] and widespread public criticism.[6] Congress react-

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[3] A task force had reported on the matter a year earlier on March 31, 1982, but the President's issuance of his March 11, 1983 directive responded to the more contemporaneous events. The quotes are from the historical background report, House Comm. on Post Office and Civil Service, *Federal Polygraph Limitation and Anti-Censorship Act of 1984*, (H.R. 4681), H.R. Rep. No. 961, 98th Cong., 2d Sess. 8 (1984) (Part 1) [hereinafter *Anti-Censorship Act Report*].

[4] NSDD-84 also expanded the use of prepublication review: the required submission of relevant statements to government clearance and censorship, which had previously been limited to the Central Intelligence Agency (CIA) and the National Security Agency (NSA).

[5] The General Accounting Office (GAO) testified in 1983 that approximately four million persons with access to classified information would be required to sign a nondisclosure agreement, and approximately 127,000 with access to SCI would be required to sign a prepublication review nondisclosure agreement. House Comm. on Government Operations, *Legislation Needed to Curb Secrecy Contracts*, H.R. Doc. No. 991, 100th Cong., 2d Sess. 3 (1988) [hereinafter *1988 Congressional Report*].

[6] *See Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary and the Subcomm. on the Civil Service of the House Comm. on Post Office and Civil Service*, 98th Cong., 1st & 2nd Sess. (1983 and 1984); *National Security Decision Directive 84: Hearings Before the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. (1983); *Review of the President's National Security Decision Directive 84 and the Proposed Department of Defense Directive on Polygraph Use: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Oper-*

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ed with an appropriations-based moratorium, much like the Act of Congress (Section 630) now being challenged.[7] Accordingly, in 1984, the President suspended portions of NSDD-84, with a promise to work with the Congress on the matter.[8]

In 1986-7, ISOO decided to continue pushing its nondisclosure initiative,[9] with forms including provisions creating a concept of punishment for disclosing "classifiable" information, whatever that might be, as distinct from classified information. *1988 Congressional Report* at 5. Under this massive and expensive government-wide pro-

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ations, 98th Cong., 1st Sess. (1983); House Comm. on Government Operations, *The Administration's Initiatives to Expand Polygraph Use and Impose Lifelong Censorship on Thousands of Government Employees,* H.R. Rep. No. 578, 98th Cong., 1st Sess. (1983); House Comm. on Post Office and Civil Service, *Anti-Censorship Act Report;* House Committee on the Armed Services, *Federal Polygraph Limitations and Anti-Censorship Act of 1984 (H.R. 4681),* H.R. Rep. No. 961, 98th Cong., 2d Sess. (1984) (Part 2).

[7] Section 1010, 97 Stat. 1017 (1983), Pub. L. No. 98-164. Senator Mathias, the author of the amendment, described it on the floor of the Senate thus:

> Our amendment would require the administration to follow the familiar formula of caution: stop, look, and listen. The administration should stop implementation of the censorship program.
>
> . . . The Administration should look at the alternatives which have been suggested in both Senate and House hearings. . . . The administration should listen to comments and suggestions of both Houses of Congress. . . . Mr. President, this amendment would freeze the status quo until April 15, 1984.

129 Cong. Rec. 14283-84 (1983).

[8] Letter from Robert McFarlane to Chairwoman Schroeder (March 20, 1984), *reprinted in Anti-Censorship Act Report* at 55. ("Rather than resume the legislative debate on the merits of NSDD 84, we would prefer to work cooperatively with Congress to develop a mutually-acceptable solution to this problem.")

[9] The Solicitor General suggests incorrectly that Congress assailed the initiative at the "last minute" from a drive to interfere "categorically." Motion to Affirm at 20. It was ISOO that launched a late effort.

gram, 2.5 million present and former government employees and 1.1 million defense contractor employees were being required to sign nondisclosure forms.[10] In fresh Congressional hearings, numerous official, expert and public witnesses criticized these new forms and their potential impact on government employees' communications with Congress about military waste and wrongdoing.[11]

Congress responded, as in 1983, with a temporary appropriations-based moratorium, as part of the government-wide continuing resolution for Fiscal Year 1988. Section 630 of Pub. L. No. 100-202, 100 Stat. 1329 (1987). Whereas the Solicitor General suggests that Congress was bent on "categorically" (Motion to Affirm at 16) interfering with Presidential prerogatives over classified information, the reality is that Congress refused to fund only specific aspects of ISOO's program. First, and foremost, the statutory moratorium refused to fund the two particularly flawed ISOO forms. The moratorium explicitly preserved the President's authority to continue acting in this context, just not with those two ISOO forms.[12]

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[10] *See Congress and the Administration's Secrecy Pledges: Hearing Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 160 (1988) (GAO testimony) [hereinafter *1988 Hearings*]. In addition, "453,000 current and former employees, excluding the CIA and NSA, have signed SCI agreements [requiring prepublication review]." *Id.* at 166. As former CIA Director Stansfield Turner testified, based on prepublication review of his own book, "the CIA is seriously short of staff to conduct the prepublication reviews," and "the bureaucracy to handle hundreds of thousands of people's writings would be immense if it were not to be very slow." *Id.* at 104-105.

[11] *Classified Information Nondisclosure Agreements: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 100th Cong., 1st Sess. (1987) [hereinafter *1987 Hearings*].

[12] It provided that "No funds appropriated in this resolution or any other Act for fiscal year 1988 may be used to implement or enforce the agreements in Standard Forms 189 and 4193 of the Government . . ." The moratorium stated th t no funds shall be used to "implement or

Continued

Second, the moratorium precluded forms equivalent to the two named ones from controlling "classifiable" information, by refusing to fund:

> any other nondisclosure policy, form or agreement if such policy, form or agreement (1) concerns information other than that specifically marked as classified; or, unmarked but known by the employee to be classified; or unclassified but known by the employee to be in the process of a classification determination; [or] (2) contains the term 'classifiable.'

Id. § 630 (1) and (2). Finally, the moratorium precluded funding for any agreement which impeded rights to communicate with Congress.[13] The conference report accompanying the statutory moratorium summed up the legislative intent to prod further discussion between the two branches.[14]

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enforce" the covered contracts, but goes on to state: "*Provided*, that nothing in this section shall affect the enforcement of those aspects of such nondisclosure policy, form or agreement that do not fall within subsections (1)–(5)." *Id.*

[13] It precluded funding for any agreement which impeded:

> the rights of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress; (4) interferes with the right of the Congress to obtain executive branch information in a secure manner as provided by the rules and procedures of the Congress; (5) imposes any obligations or invokes any remedies inconsistent with statutory law.

Id. § 630(3)–(5).

[14] "The purpose of this amendment is to address serious concerns of the Congress about the obligations imposed on government employees by nondisclosure agreements. . . . The amendment identifies several of these concerns and would bar the enforcement of such questionable obligations during fiscal year 1988. . . . It is the intent of the authors of this amendment, during the coming year, to examine the entire issue of nondisclosure agreements, including prepublication review and make appropriate responses to Executive Branch policy in this area as needed." *Conference Report to Accompany H.J. Res. 396*, H.R. Conf. Rep. No. 1398, 100th Cong., 1st Sess. 1179 (1987).

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Meanwhile, the instant litigation reached the point of rulings on cross-motions for summary judgment. In a peculiar reversal of order, the single-judge district court's two rulings first addressed the highest-level questions of the constitutionality of the enacted moratorium, and only thereafter addressed whether there was any need for the constitutional ruling. In the first ruling, on May 27, 1988, *American Foreign Service Association v. Garfinkel,* 688 F. Supp. 671 (D.D.C), Senior District Judge Oliver Gasch did not address how much of the moratorium was at issue, beginning his analysis with the naked assumption: "*Assuming* that the Executive's actions since enactment of section 630 do not comply with the requirements of that legislation," Judge Gasch would determine whether "section 630 unconstitutionally impinges on the President's discretion to regulate access to and disclosure of national security information." J.S. at 22a.[15] His decision simply recited sweeping generalizations and a half-dozen judicial opinions on the President's role in national security, J.S. at 22a–27a.

Two months later, when Judge Gasch focused on the actual concrete controversy over the use of the term "classifiable" in the nondisclosure agreements—Congress' primary concern in the moratorium—he agreed with Congress that the Executive Branch's reliance on the concept of "classifiable" information was itself unconstitutional. J.A. at 93. The Administration had responded to the statutory moratorium by starting to replace the prohibited forms with new forms omitting the objectionable term "classifiable." [16] The new forms made no explicit mention of any objectionable requirement of pre-authorization by superiors before employees could give information to Con-

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[15] The district court relegated the fact that the Executive Branch had dropped the flawed forms prohibited by the moratorium to a footnote. *Id.* at n.16.

[16] On March 18, 1988, the Administration replaced Standard Form 4193 with a new contract (SF 4325) for those with access to Sensitive Compartmented Information (SCI) which does not use the term "classifiable." J.A. at 58–62.

gress. After Judge Gasch's ruling that struck down Section 630, ISOO finished dropping the "classifiable" provisions.[17] Judge Gasch thereby vindicated the primary purpose of the moratorium, but only after the self-contradicting action of gratuitously striking down an Act of Congress as unconstitutional.

Faced with the expiration of the one-year statutory moratorium, the House Committee on Government Operations held important hearings on the issue on August 10, 1988, receiving official, public, and expert criticism of Judge Gasch's decision. Chairman Brooks "f[ou]nd it incredible that a court has concluded that a law—voted on by the Congress and signed by the President—is an inappropriate method to set the balance between national security and first amendment concerns that these contracts raise. . . ." *1988 Hearings* at 2.[18] With the size and cost

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[17] ISOO replaced SF 189 (and 189-A) on September 29, 1988 with a new form (SF 312) which does not cover "classifiable" information. 53 Fed. Reg. 38,278-80 (1988) (to be codified at 32 C.F.R., Part 2003). Plaintiffs and defendants may well raise subsidiary questions regarding such matters as the period during which agencies continued to require the signing of old forms or had them signed with a mere addendum, and the asserted inadequacy of efforts retrospectively to cure past problems by notice or otherwise. Such questions do not provide a sufficient reason to question the constitutionality of an Act of Congress when its primary purpose has been sustained. *See, e.g., Alejandrino v. Quezon*, 271 U.S. 528, 535 (1926) (refusing to let "incidental issue" of backpay prevent dismissal when "main question . . . has become moot").

[18] Admiral Stansfield Turner, former director of the CIA, testified that the nondisclosure agreements were "not critical" to our national security and that "other than in the CIA and NSA, we have gotten along well for a long time without them." *1988 Congressional Report* at 14. *See also* S. Turner, *Secrecy and Democracy* 290 (1985) ("Congress should establish the period during which former employees must submit their writings for clearance [under the censorship contract]"). The House Committee on Government Operations adopted the aforecited *1988 Congressional Report* affirming that "it is within Congress' authority to legislate restrictions and controls on nondisclosure agreements." *Id.* at 20.

of the program growing,[19] reenactment of the appropriations moratorium was strongly supported,[20] and was in fact enacted the following month. Section 619, Pub. L. No. 100-440, 102 Stat. 1721. Notably, the new moratorium refused to fund the old forms, cited by number, dropped by ISOO during the moratorium, but did not mention the new forms. Congress thus clearly aimed, not at categorically wiping out all the President's action in this context, but at temporarily not funding particular ISOO forms and specified abuses while continuing to study the issue.

B. *Absence of a Concrete Case*

The Court refuses generally to rule on moot cases, *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), or on cases lacking "sufficient immediacy and reality." *Golden v. Zwickler*, 394 U.S. 103, 109 (1969). Beyond that, the Court requires the highest level of concreteness in cases, like this, in which one side or the other facially challenges an Act of Congress. The Court applies a "rigid insistence that the jurisdiction of federal courts is limited" when presented with challenges to "the validity of an act of Congress." *Ashwander v. Tennessee Valley Authority*, 297 U.S. at 345 (Brandeis, J., concurring).

Accordingly, the Court has repeatedly either held that it would not consider abstract challenges to Acts of Congress, or at least would remand for reconsidering whether they remained concrete.[21] *See, e.g., Kremens v. Bartley,*

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[19] *See 1988 Hearings.* According to the GAO testimony in the first several months of 1988, 43,000 additional SF 189 contracts and 6,000 SF 4193 contracts were signed despite the moratorium. *Id.* at 165-166.

[20] *1988 Hearings* at 15, 83, 189 (exchanges by key Members).

[21] *See also Watson v. Buck*, 313 U.S. 387, 402 (1941) ("A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.")

431 U.S. 119, 134-35 (1977) (remanding for reconsideration rather than resolving "unfocused" constitutional claim); *Socialist Labor Party v. Gilligan,* 406 U.S. 583, 587-9 (1972). "[T]here will be time enough [later] to consider that problem in a factual context," *Nixon v. Administrator of General Services,* 433 U.S. at 445.

This Court demonstrates the highest caution of all in addressing separation of powers controversies in national security contexts. Throughout the early 1970s, the Court declined to decide numerous cases arising out of the Indochina War, including cases, like this one, concerning appropriations-constraining moratoriums. *See Holtzman v. Schlesinger,* 484 F.2d 1307, 1312-13 n.3 (2d Cir. 1973) (collecting cases), *cert. denied,* 416 U.S. 936 (1974). Lower courts have read this Court's precedents as reflecting a particular reluctance to resolve suits for injunctive relief regarding national security. *Adams v. Vance,* 570 F.2d 950 (D.C. Cir. 1977). In a striking 1979 example, the Court vacated for lack of jurisdiction the separation of powers challenge to the termination of the Taiwan Treaty. *Goldwater v. Carter,* 444 U.S. 996 (1979).

In light of these principles, and with the primary purpose of the challenged Act of Congress vindicated, the case no longer presents a live question. Judge Gasch created the illusion of a concrete case only by proceeding in reverse order with the case. First he struck down the Act of Congress; then he declared unconstitutional the practices it has refused to fund. With those rulings viewed in orderly sequence the case presents no reason for reaching the question of the Act's constitutionality. *Surely, the courts do not intend to rule on the Congress' obligation to fund unconstitutional programs which have ended.*

Subsidiary issues about the moratorium simply do not present enough of a concrete and live case for a ruling like Judge Gasch's. Of those subsidiary issues, the one which came closest to any substance was Section 630's refusal to fund forms impairing the rights of government employees to inform Congress through secure channels.

See Section 630 (3). For all the Solicitor General's claims about Executive power to interfere with government employees providing information to Congress, the nondisclosure forms do not incorporate those assertions in any explicit way. Rather, they simply require that classified information be provided only to persons "authorized to receive it." J.A. at 60. Whatever abstract pronouncements the Solicitor General may make, Congress understands its own Members to be "authorized to receive" such information through secure channels from government employees,[22] and ISOO has not promulgated a form explicitly directing government employees not to inform Congress. Thus, ISOO's nondisclosure forms do not bring an issue to the point of concreteness needed for a ruling on the constitutionality of an Act of Congress.

In the motion to affirm, the Solicitor General correctly noted that "the Court does not have before it in this case any concrete instance in which an employee . . . has been disciplined or denied further access to classified information because he made such a disclosure [to a Member of Congress] without seeking or obtaining prior approval." Motion to Affirm at 29. While there is much to disagree with in the Solicitor General's arguments on the merits, this point about the lack of a concrete case is well taken. The absence of a case over a concrete individual, the absence of an explicitly worded prohibition in the nondisclosure forms, and the statutory moratorium's limited wording, all reflect that the basis is not present in this Court for such a ruling.[23]

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[22] As discussed below, that understanding draws on two centuries of active Congressional involvement in oversight of national security, and on Congressional involvement today in many of the most sensitive of such matters, including intelligence matters.

[23] *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (holding that courts should not decide important constitutional questions on less than an "adequate and full-bodied record"); *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973) (declining "the assumption of a continuing judicial review of substantive political judgments entrusted expressly to the co-

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Until now, this Court has repeatedly cited Congressional oversight as a major reason why it can stay out of such controversies. An example is one of the main comparable cases of the past two decades raising the issue of chilling of First Amendment rights in the intelligence context, *Laird v. Tatum*, 408 U.S. 1 (1972). In *Laird*, Army Intelligence established a data-gathering system which surveilled domestic civilian political activity, and civilians brought suit for injunctive relief. This Court found the case insufficiently concrete for decision, not wanting "the federal courts [to be] virtually continuing monitors of the wisdom and soundness of Executive action" in that intelligence context. *Id.* at 15. Instead, the Court held that "such a role is appropriate for the Congress acting through its committees and the 'power of the purse,' " *id.*, and the Court stated its respect for the "concerns of the . . . Legislative Branch[] in response to disclosure of the Army surveillance activities." *Id.* When Judge Gasch reached out and held that he would pass upon issues concerning the "anti-leak" program, while disabling Congress from doing so, he turned that philosophy of judicial restraint on its head. Legislative Branch oversight, and use of the power of the purse, were supplanted by judicial action. The consequence would be precisely what *Laird v. Tatum* predicted, namely, that those expecting sympathetic judicial treatment would forsake the halls of democracy and bring their political disputes over these issues to the life-tenured branch.

Few cases pose such broad, formless separation of powers issues as this one. On the one hand is a Congressional refusal to fund; on the other, a claim of inherent Presidential prerogative. On the one hand are the power of the purse and the power to probe; on the other, the power of the sword. On the one hand is a Congressional invocation of its authority for two centuries to legislate regarding government information, to secure information

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ordinate branches of government"); *Laird v. Tatum*, 408 U.S. 1, 15 (1972); *Rescue Army v. Municipal Court*, 331 U.S. 549, 584–85 (1947).

for itself from government employees, and to decide what programs to fund; on the other, Presidential powers relating to classification. Deciding the constitutionality of this Act of Congress means that extensive fields of interaction hitherto left to Congress and the President will be judicialized. A whole area of national security into which the courts have not ventured will be invaded. All this will be done without anything even remotely resembling an adequate record.[24] Under the circumstances, the Court should not rule on momentous constitutional issues.

II. CONGRESS MAY LEGISLATE ABOUT GOVERNMENT INFORMATION, PARTICULARLY ABOUT PROGRAMS TO WITHHOLD INFORMATION FROM CONGRESS ITSELF, AND MOST PARTICULARLY MAY DECIDE WHETHER TO APPROPRIATE FOR SUCH PROGRAMS

A. *Congress and the Executive Share Authority Over National Security Generally*

If the Court reaches the constitutional challenge against the Act of Congress urged by the Executive Branch, it should recognize the constitutional and historically-confirmed authority of Congress in this context. As noted by *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637-638 (1952) (Jackson, J., concurring), which furnishes the test for such separation of powers challenges (*see Dames & Moore v. Regan,* 453 U.S. 654, 669 (1981)), "Presidential powers are not fixed but fluctuate,

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[24] The case concerns no specific incident, and therefore no particular penalized individual, no item of information provided to (or withheld from) Congress, no specific Congressional entity granted or denied information, and not even any explicit language in the nondisclosure statement on key points. Not only did Judge Gasch hold no trial or even an evidentiary hearing, deciding the case on conclusory agency affidavits appended to summary judgment motions, but as discussed above, he completely ignored the six-year history in which Congress had held hearing after hearing, issued reports, held floor debates, and thereby developed its own extensive legislative record. That legislative record, having received no study below, does not come to this Court having been at all analyzed judicially.

depending upon their disjunction or conjunction with those of Congress." *Youngstown*, 343 U.S. at 635. In challenging an Act of Congress, the Executive's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 637. This Court would strike down an Act of Congress only on the ground of such "exclusive presidential control" and "by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution." *Id.*, at 635–38. *See Cole v. Young*, 351 U.S. 536, 558 n.20 (1956).

Consequently, Acts of Congress struck down by the Court on separation of powers grounds have all concerned Congressional post-enactment mechanisms—such as legislative vetos, legislative appointments, or legislative removals—found to violate specific provisions of the Constitution.[25] This Court has *never* overturned *any* statute on the separation of powers theory embraced by the district court that the *subject* was so exclusively reserved for the President as to disable the Congress from acting. When the district court took the step of striking down this statute on the grounds that the President had such exclusive power that Congress could not refuse to appropriate for

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[25] Statutes which have been struck down by this Court on separation-of-powers grounds have been determined to have run afoul of specific textual constitutional prohibitions. *See, e.g., Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 946–47 (1983) (requirements for bicameralism and presentation to the President under article I, § 7, which "the draftsmen took special pains to assure . . . could not be circumvented"); *Buckley v. Valeo*, 424 U.S. 1 (1976) (the appointments clause under Article II is a "cognate provision[ ] of the document."); *Bowsher v. Synar*, 478 U.S. 714 (1986) (assignment of executive functions to an officer removable by Congress). *Compare Morrison v. Olson*, 108 S. Ct. 2597 (1988); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986); *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987).

this program, J.S. at 27a, it acted absolutely without a shred of historical precedent.[26]

In the realm of national security, the Constitution simply does not provide the President with the "conclusive and preclusive" role required to completely disable Congress from "acting upon the subject." Only two years ago, this Court recognized the "premier role which both Congress and the Executive play in this field." *Japan Whaling Assn. v. American Cetacean Society*, 478 U.S. at 230. In that case, like this one, the Solicitor General urged broad Executive powers on this Court, invoking dicta out of context from cases involving clear Presidential prerogatives (such as recognition of foreign governments). The Speaker and Bipartisan Leadership Group appeared as amicus curiae in the case, properly presenting to the Court the large role of Congress even in international relations. Soundly, the Court accepted the amicus position, with its emphasis that "both Congress and the Executive" play that role.

It is the Congress—not the President—which the Constitution empowers "to declare war," art. I, § 8, cl. 1; to "regulate Commerce" including foreign commerce, art. I, § 8, cl. 3; "to raise and support armies," art. I, § 8, cl. 12, "to provide and maintain a navy," *id*, cl. 13, "to make rules for the Government and regulation of the land and naval forces," *id.*, cl. 14, and "to provide for organizing, arming and disciplining, the militia," *id.*, cl. 16.[27] Of course, the President possesses his own powers regarding national security, such as serving as "Commander-in-Chief" [28] and his duty to "take Care That the Laws be

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[26] *See 1988 Congressional Report; see also 1988 Hearings*, 1113-165 (statements on unprecedented nature of district court decision by Michael Glennon, Professor of Law, University of California, Davis and Harold Bruff, Professor of Law, the University of Texas).

[27] *See* U.S. Const., art. I, § 8, cl. 18 (Necessary and Proper Clause).

[28] This power is circumscribed by the appropriations power. It "would amount to nothing more than the supreme command and direction of the military and naval forces . . . while that of the British

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faithfully executed." [29] Art. II., § 2, cl. 1 and § 3. However, these manifestly do not render the subject in question exclusively Presidential in nature, but merely show that where matters of war, armies, and security are concerned, there is a shared realm in which both Congress and the President act.

B. *Congress May Legislate Regarding Government Information, Particularly About Withholding From Congress Information About Waste and Wrongdoing*

Congress has manifest authority to regulate information and document handling by federal employees. The statutory "regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its [executive] autonomy." *Nixon v. Administrator of General Services,* 433 U.S. at 445. That case upheld the Presidential Recordings and Materials Preservation Act, which regulated the papers of former President Richard Nixon, against a separation of powers challenge because

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King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the constitution under consideration, would appertain to the legislature." *The Federalist*, No. 69 at 449 (A. Hamilton) (emphasis in original). As Justice Jackson indicated, "While Congress cannot deprive the President of the command of the Army and Navy, only Congress can provide him an Army or Navy to command." And Congress, because it is empowered to make rules for the "Government and Regulation of army and naval forces" may "impinge . . . to some unknown extent . . . upon even command functions." *Youngstown*, 343 U.S. at 644.

[29] The "Executive Power" is not taken as a grant in bulk of other powers. *Youngstown*, 343 U.S. 640–41 (Jackson, J., concurring). The "faithful execution" clause, contrary to claims by the Executive, does not constitute a positive grant of power for the President, but instead a limit on what the Executive may do with its own powers. *Kendall v. United States ex. rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838); *Youngstown*, 343 U.S. at 587 (majority opinion); *id.* at 610 (Frankfurter, J., concurring); *id.* at 646 (Jackson, J., concurring); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974). *See Ameron, Inc. v. U.S. Army Corps of Engineers*, 610 F.Supp. 750, 755 (D.N.J. 1985) (history of clause), *aff'd*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988).

the Court did not believe the Act prevented the Executive Branch from "accomplishing its constitutionally assigned functions." *Id.*, at 443.

Two years later, in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), the Court confirmed that "classified" or national security information is not insulated from Congressional control. Discussing the Executive Branch's classification system, the Court indicated "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject *only* to whatever limitations the Executive privilege [regarding Presidential confidential communications] may be held to impose upon such Congressional ordering." *Id.* at 83 (emphasis added).[30]

No short list could do justice to the extensive precedent for Congressional regulation of government information. As noted in *Nixon v. Administrator of General Services*, 433 U.S. at 445:

> of course, there is abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch. See, *e.g.*, the Freedom of Information Act, 5 U.S.C. § 552 (1970 ed. and Supp. V); the Privacy Act of 1974, 5 U.S.C. § 552 (a) (1970 ed., Supp. V); the Government in the Sunshine Act, 5 U.S.C. § 552b (1976 ed.); the Federal Records Act, 44 U.S.C. § 2101 *et seq.*; and a variety of other statutes, *e.g.*, 13 U.S.C. §§ 8–9 (census data); 26 U.S.C. § 6103 (tax returns).

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[30] The executive privilege, to the extent (if any) it applies to the Congress, would not extend throughout the Executive Branch's millions of employees. *See United States v. Nixon*, 418 U.S. 638 (1974) (executive privilege only for Presidential communications).

Such Congressional regulation necessarily extends to classified records and information, and there is a comprehensive network of legislation for classified information.[31] The classification system is impotent without that network of legislation, for Congressional statutes—not an administrative system—establish the criminal offenses for security violations, their conduct and intent standards, the judicial procedures, the weight to be given to the fact of classification, and the punishments for such offenses.[32] When civil liberties and national security must be balanced in this context, "[t]he need for a legislative judgment is especially acute," *United States v. Robel,* 389 U.S. 258 (1967); *Kent v. Dulles,* 357 U.S. 116, 128 (1958). *See New York Times Co. v. United States,* 403 U.S. 713 (1971).[33]

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[31] *See, e.g.,* the Freedom of Information Act, 5 U.S.C. § 552(b)(1); the Privacy Act, 5 U.S.C. § 552a; the Central Intelligence Agency Information Act, Pub. L. No. 98-447, 98 Stat. 2209 (*see CIA v. Sims,* 471 U.S. 159, 168 (1985)); the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801-1811; the Classified Information Procedures Act, 18 U.S.C. § 1-16; and above all the espionage laws, 18 U.S.C. 792, *et seq.*

[32] Similarly, the Freedom of Information Act records that Congress has set the test for withholding of documents from the public: whether documents are "in fact properly classified," 5 U.S.C. § 552b(1), with *de novo* judicial review where appropriate. The Executive Branch's high-flying citations to the discussion in *Department of the Navy v. Egan,* 108 S. Ct. 818 (1988), conspicuously omit the key qualification that deference to the Executive occurs "unless Congress specifically has provided otherwise." *Id.* at 625.

[33] In *New York Times,* Justice White, in his concurrence, examined in detail the laws governing espionage, concluding "that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information", 403 U.S. at 740 (citations omitted). *See also id.* at 718 (Black, J., concurring) (criticizing the Executive for "not even attempt[ing] to rely on any Act of Congress" and acting "even when the representatives of the people in Congress have adhered to the command of the First Amendment"); *id.* at 722 (Douglas, J., concurring) ("Thus, Congress has been faithful to the command of the First Amendment in this area.")

Moreover, Congress can legislate regarding executive programs aimed at withholding information from Congress itself. As this Court has recognized, Congress's ability to oversee and investigate the executive branch is an essential attribute of the legislative function.[34] History provides the best guide to this authority, and strongly confirms it. Starting in 1792, the House of Representatives voted to create a special committee to investigate the Army's disastrous military expedition against Indian tribes in the Northwest Territory.[35] The St. Clair Investigation examined numerous witnesses and documents that would be classified today, concerning procurement waste, military readiness, and the communication from Secretary of War Knox to Major General St. Clair, conveying President Washington's orders. *Congress Investigates* at 11-13.

From that first Congressional investigation until today, it is reported that "Congressional Committees have examined the conduct of all the wars in which the United States has engaged except the Spanish-American War. . . ." Galloway, *The Investigative Function of Congress*, 21 Am. Pol. Sci. Rev. 47, 48 (1927).[36] Most recently,

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[34] *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (Congress's investigatory powers are "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."); *McGrain v. Daugherty*, 273 U.S. 135, 175 (1926); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975).

[35] A. Schlesinger, *Congress Investigates: 1792-1974* 7 (1975) [hereinafter *Congress Investigates*]; T. Taylor, *Grand Inquest: The Story of Congressional Investigations* 35 (1955). James "Madison, who had taken an important part in framing the Constitution only five years before, and four of his associates in that work, were members of the House of Representatives at the time, and all voted for the inquiry." *McGrain v. Daugherty*, 273 U.S. at 161.

[36] *See* R. Berger, *Executive Privilege: A Constitutional Myth*, 44, n. 171 (1974) (To cite only a few early examples, the House scrutinized the Treasury Department (1800 and 1824), the territorial government of Mississippi (1800), the War Department (1809 and 1832), the conduct of General James Wilkinson (1810), government clerks generally

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select committees of the Senate and House held exhaustive hearings into intelligence operations of the Iran-Contra affair.[37]

During this time, programs to block providing of government employee information to Congress have received decisive responses. Around the turn of the century, the Theodore Roosevelt and Taft Administrations imposed a series of gag orders on federal employees prohibiting them from communicating with Congress on grievance [38] or other matters.[39] Congressional response was intensely

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(1818), the Post Office (1820 and 1822), the Bank of the United States (1832 and 1834), the New York Customs House (1839), the conduct of Captain J.D. Elliott commanding a naval squadron in the Mediterranean (1839), the Commissioner of Indian Affairs (1849), the Secretary of Interior (1850), the Smithsonian Institution (1855). In the meantime, the Senate had [l]ooked into General Andrew Jackson's conduct of the Seminole Wars in Florida (1818), the Internal Revenue Bureau (1828), the Post Office (1830), and John Brown's Raid at Harper's Ferry (1859).

Similarly, a joint Senate-House Committee was established for oversight during the Civil War. *Congress Investigates*, p. 76–77. As in the St. Clair investigation, that Committee reviewed supplies, transportation, morale, treaties, and command functions involved in the prosecution of the war by the Army. *Id.* at 76–94.

[37] *Report of the Congressional Committees Investigating the Iran-Contra Affair*, S. Rep. No. 216 & H. Rep. No. 433, 100th Cong., 1st Sess. (1987).

[38] The Roosevelt gag order prohibited communicating to Congress "either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation." S. Spero, *Government As Employer* 123 (1948). The first gag order was issued on January 31, 1902. Exec. Order No. 163, *reprinted in* 48 Cong. Rec. 5223 (1912). It was reissued on January 25, 1906 and amended to include the independent agencies as well as the executive departments.

[39] In 1909, President Taft supplemented the Roosevelt orders by extending the prohibition from communicating with Congress about job grievances to cover "Congressional action of any kind" and by adding a prohibition against employees " 'Respond[ing] to any request for information from either House of Congress, or any Committee of either House of Congress, or any member of Congress except through and as authorized by the head of his department.' " Executive Order No. 1142 of November 26, 1909, *reprinted in* 48 Cong. Rec. 7513 (1912).

negative.[40] The House voted 132 to 1 for a provision in the postal appropriations bill for 1913 to allow postal workers to communicate to Congress.[41] As Representative Lloyd warned, "[i]f no Government employee is permitted to speak, excepting through his department chiefs and the department chief through the Cabinet officer . . . then there is no possible way of obtaining information." *Id.* at 10671. The Senate expanded the House provision, limited to postal workers, to guarantee all civil servants the absolute right to communicate with Congress, which became section 6 of the Postal Appropriations Act of 1913, better known as the Lloyd-LaFollette Act:

> The right of persons employed in the Civil Service of the United States, either individually or collectively to petition Congress or any member thereto, *or to furnish information to any House of Congress or to any Committee or Member thereof*, shall not be denied or interfered with.

5 U.S.C. § 7211 (emphasis added).

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[40] Congress believed the gag orders to be an affront to the Constitution and the "sacred rights" of federal employees under the First Amendment. 48 Cong. Rec. 4493 (1912) (Remarks of Rep. Moon). *See also id.* at 5080 (Remarks of Rep. Rouse), 5203 (Remarks of Rep. Prouty), 5626 (Remarks of Rep. Fowler), and 4238 (Remarks of Rep. Blackman) (gag orders represented "suspension of the Constitution."). Further, the gag orders were described as "un-American and unrighteous," *id.* at 5223 (Remarks of Rep. O'Shaunessy), "obnoxious" and "galling," *id.* at 5235 (Remarks of Rep. Buchanan), "un-American, undemocratic, despotic, and cruel." Appendix to 48 Cong. Rec. 154 (speech of Rep. Kinkian). Government employees were "handicapped, shackled, and gagged" by the Administration's orders. *Id.* at 5157 (Remarks of Rep. Evans) and "chocked and tied hand and foot," *id.* at 4656 (remarks of Rep. Calder). The Administration was a "tyranny" and "petty despotism." *Id.* at 5157 (Remarks of Rep. Rouse).

[41] 48 Cong. Rec. 5639 (1912).

The Civil Service Reform Act of 1978,[42] its legislative history,[43] and the focus on protecting particular employees [44] make clear that protection of government employees who inform Congress necessarily applies to all information, whether classified or not. Congress has been explicit in protecting the government employees it depends upon for important national security information.[45]

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[42] The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1114 includes specific provisions to protect government whistle-blowers from agency reprisals for their disclosures of illegal, improper, or wasteful government activities. *See* 5 U.S.C. § 2302(b)(8). Although Congress recognized the executive's classification system by not protecting such disclosure to the public, disclosures of such information to appropriate governmental officials are protected. *Id.* Further, the statute preserves Lloyd-LaFollette: "This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress." 5 U.S.C. § 2302(b).

[43] "[B]y placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress. Neither title I nor any other provisions of the Act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress." *Conference Report to Accompany the Civil Service Reform Act of 1978*, H.R. Conf. Rep. No. 1717, 95th Cong, 2d Sess. 132 (1978).

[44] One impetus for the statute was the case of Ernest Fitzgerald, who testified before a Congressional subcommittee in November of 1968 about a two billion dollar overrun on procurement of the C-5A transport aircraft, and was subsequently harassed by the Department of Defense. *See Hearings Before the Subcomm. on Economy in Government of the Joint Economic Committee*, 90th Cong., 2d Sess. 200-202 (1968); *Hearings Before the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess, 331-335, 529-551, 571-580 & 714-745 (1978) (testimony by Fitzgerald and others leading to the 1978 act); 1987 Hearings* at 17-20, 27-32; *Harlow v. Fitzgerald, 457 U.S. 800 (1982).*

[45] Section 846 of the National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, 102 Stat. 1918, 2027 (protections for military employees who inform Congress amended to specifically cover disclosures of classified information). Federal employees' communications, not filtered through superiors, are of critical importance to Con-

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C. *Congress Decides Whether to Withhold Appropriations*

The Constitution confers on Congress the unfettered power to decide whether to withhold appropriations from a government program by providing that "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law," U.S. Const., art. I, § 9, cl. 7. Parliament's same power of the purse, the antecedent of this authority, included the power to curb Executive initiatives in foreign affairs, defense, or intelligence by refusals to fund them,[46] and the Framers had most earnestly championed Congress's exercise of a similar power.[47]

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gress. *Gravel v. United States,* 408 U.S. 605, 630 (1972) (Stewart, J., dissenting in part) ("in preparing for legislative hearings, debates, and roll calls, a Member of Congress obviously needs the broadest possible range of information. Valuable information may often come from sources in the Executive Branch . . . [a]nd informants such as these may be willing to relate information to a Congressman only in confidence").

[46]

> The provision [appropriations clause of the Constitution] was framed against the backdrop of 150 years of struggle between the King and Parliament for control over the purse, often centering on military matters. In 1624 the House of Commons for the first time conditioned a grant of funds to the king. The Subsidy Act of that year prohibited the use of any military monies except for financing the navy, aiding the Dutch, and defending England and Ireland. Two years later Charles I attempted to wage war without popular support, but Parliament promptly denied him funds to conduct it. . . .

1988 Hearings at 145–46 (Statement of Professor Glennon) (footnotes omitted).

[47] While the appropriations power is not confined to foreign policy and security issues, *see The Federalist,* No. 58 (J. Madison) (the appropriations power represents "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure"):

> Meeting in Philadelphia in 1787, the Framers were well aware of the tradition of parliamentary power over the purse and its use to check unwanted 'national security' activities.

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Any notion that the President's powers override Congress's authority to withhold appropriations utterly defies the Framers' most basic doctrine of separation of powers: as George Mason stated it, "the purse and the sword should not be in the same hands." M. Farrand, 1 *The Records of the Federal Convention of 1787* at 144 (1937). This is the "most important single curb in the Constitution on presidential power." E. Corwin, *The Constitution and What It Means Today* 101 (1973 ed.).

Congress established from the first years of the Republic through the twentieth century that it would decide, by granting or withholding appropriations, whether to proceed with such programs as treaty implementation and military preparations.[48] As a leading commentator summed up the subsequent experience:

> Congress is free to refuse to appropriate funds required for the execution of treaties; it can snub the

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> . . . Madison considered it 'particularly dangerous to give the keys of the treasury, and the command of the army, into the same hands.' . . . Accordingly, the Framers chose, in the words of Jefferson, to transfer the war power 'from the executive to the legislative body, from those who are to spend to those who are to pay.'

1988 Hearings at 145–46 (Statement of Professor Glennon) (footnotes omitted). *See* Wolfson, *Is a Presidential Item Veto Constitutional?* 96 Yale L.J. 838, 841–44 (1987).

[48] E. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations,* Ann. of the Am. Acad., Sept. 1953, at 1245, 1246–49. As military Chief of Staff Omar Bradley said, "Under our form of government, the military policy of the United States is shaped by Congress not by the Armed Forces . . . because . . . Congress controls the appropriations which in the final analysis . . . control the military policy. . . ." *Hearings on Military Functions, National Military Establishment Appropriations Bill for 1949 (Part 3),* House Comm. on Appropriations, 80th Cong., 2d Sess. 5, 14 (1948). *See* E. Huzar, *The Purse and the Sword: Control of the Army by Congress through Military Appropriations 1933–1950* (1950) (describing military appropriations provisions on organization, personnel, and finance). "Much more common in the military supply measures than affirmative legislation on [military] organizations have been limitations on appropriations." *Id.* at 211.

> President's requests for funds needed to finance long-range, large-scale military, economic, and technical assistance programs; it can provide authorizations and funds . . . contrary to the President's policies; it can deny or limit the amount of money which the United States can contribute to international organizations, either as regular annual contributions or as voluntary payments to operating programs; and it can deny funds to enable the United States to participate in international meetings and conferences.

Nobleman, *supra*, at 145–46.

This Court established early that the President's powers in wartime did not extend beyond statutory limitations. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818). One nineteenth century example of an appropriations law curb was the "posse commitatus" law in 1878, enacted as a provision on the Army appropriations bill.[49] That appropriation law provision established the fundamental legal division between the military and civilian realms which has endured ever since. Of course, even the limited intelligence operations in the era before World War II, like all government activities, responded to control by appropriations.[50]

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[49] In its current form, the law prohibits the "willful[] use [] [of] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws," 18 U.S.C. § 1385.

[50] One prominent example was the predecessor to today's National Security Agency, the post-World War I "Black Chamber" which monitored diplomatic telegrams. As its commander described, it came into existence through funds "which Military Intelligence managed to obtain from Congress after taking some of the leaders into their confidence. I was told that there was a joker in the Department of State special funds: they could not legally be expended within the District of Columbia." *Final Report of the Senate Sel. Comm. to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. No. 755, 94th Cong., 2d Sess., Book VI 116–17 (1974). Another example was the World War II intelligence operation, the Office of Strategic Services ("OSS"), the directive of which stated that "all funds to operate

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The end of World War II brought a dramatic increase in the peacetime expenditure of appropriations for national security programs, including foreign aid, defense, and the newly expanded intelligence operations. Annual appropriations for these programs involved numerous Congressional decisions on whether to fund programs, with many such decisions framed as limitations on the funds provided in the bill. These include the fundamental charter for covert operations, the Hughes-Ryan Amendment of 1974:

> No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries . . . unless and until the President [makes a] finding . . . and reports, in a timely fashion . . . to the appropriate committees of the Congress. . . .

Pub. L. No. 93-559, § 32, 88 Stat. 1804 (1974); 22 U.S.C. § 2422 (emphasis supplied). Other examples of appropriation limitations in the defense context include the limitations of the early 1970's which forbade further American expenditures on the war in Indochina; the Clark Amendment, which forbade further expenditures on war in Angola; and the Boland Amendment, which forbade further expenditures on war in Nicaragua.[51]

OSS must come from Congress, primarily the House and Senate Appropriations Committees." *Id.* at 141-42.

Much is made by the Executive Branch of the use of confidential funds by Presidents for spy activity. *Totten v. United States*, 92 U.S. (2 Otto.) 105 (1875). Such arrangements simply reflect that Congress has established a confidential funding system, rather than any displacement of the appropriations power. L. Fisher, *Presidential Spending Power* 205-13 (1975) (Congressional establishment, oversight, and repeal of confidential funding systems from 1789 on).

[51] The Indochina War provisions are discussed in T.M. Franck & E. Weisband, *Foreign Policy by Congress* 13-31 (1979). The Clark Amendment was section 404 of Pub. L. No. 94-329, 90 Stat. 757 (1976), codified at 22 U.S.C. § 2293, repealed by section 811 of Pub. L. No. 99-83, 99 Stat. 264 (1985), codified at 22 U.S.C. § 2293 note; it is discussed in

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A judicial ruling striking down such an Act of Congress would have disastrous implications, for the Judiciary would then be called into any number of separation of powers disputes. Congress places appropriation limitations on the areas in which United States combat or covert operations may occur; executive agency interventionists may assert inherent power to override such limits. Congress establishes the military command structure, such as the unified joint commands, and prescribes reforms after procurement scandals; the military services may balk. Congress imposes restraints on intelligence agencies, such as concerning CIA operations domestically, or technical surveillance of domestic citizens; the intelligence agencies may want to shake off these shackles.

Until now, the courts have never overturned an appropriations statute by finding that it impermissibly restrains the President. Once this Court strikes one down, the agencies would find the undefined extent of inherent Executive power a sufficient basis for a limitless number of requests for the Judiciary to take on the governing of national security. A greater violation of judicial restraint, and a greater injury to the democratic system of checks and balances, than such a ruling, can hardly be imagined.

CONCLUSION

The Court should either hold that the case no longer presents a concrete basis for a ruling, or vacate the district court's decision and remand for reconsideration. However, if the Court reaches the merits, it should apply principles which leave Congress its proper and ample role.

T.M. Franck & E. Weisband at 46–55. There were a number of different Boland Amendments in the mid–1980s, discussed in *Report of the Congressional Committee Investigating the Iran-Contra Affair* at 395–405.

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